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RESIDENMAS DEVELOPMENT SDN BHD v. YM RAJA HALINUDDIN RAJA HALID

COURT OF APPEAL, PUTRAJAYA
S NANTHA BALAN JCA
MARIANA YAHYA JCA
B CHOO KAH SING JCA
[CIVIL APPEAL NO: M-02(NCVC)(W)-2003-10-2022]
5 MARCH 2024

C **Abstract** – *To determine if an assignment is conditional or absolute, the fact of an absolute assignment should normally be only that it is one by which the entire interest of the assignment in the chose in action, such as the interest claimed by the assignee is, for the time being, transferred unconditionally. When reading the four corners of an agreement, if the term 'assignment' is not stated nor is there any reference to indicate that* D *the agreement entered between the parties was one of assignment and/ or absolute assignment, and the clauses do not indicate an assignment of rights, but rather serve as a protective measure for investors, then the agreement is not considered an absolute assignment in nature.*

E ***CONTRACT:*** *Agreement – Bailout and Temporary Takeover Agreement – Whether clauses in agreement indicated assignment of rights or served as protective measure for investors – Whether agreement merely profit-sharing scheme – Whether could be construed as absolute assignment in nature – Whether fell short of meeting requisite requirements stipulated under s. 4(3) of Civil Law Act 1956*

F ***CIVIL PROCEDURE:*** *Locus standi – Parties – Agreement – Bailout and Temporary Takeover Agreement – Whether could be construed as absolute assignment in nature – Whether plaintiff capable of commencing legal suit in capacity as assignee – Whether plaintiff had locus standi*

G The appellant ('defendant') was the developer of a project ('Melaka project') and had appointed Pembinaan Suci Kesturi Sdn Bhd ('PSK') as the main contractor for the development of the first phase of the Melaka Project. In the course of executing its obligations under Phase I, PSK encountered financial and technical difficulties due to some disputes with its joint venture H partner. In order to overcome these difficulties, PSK decided to obtain assistance from the respondent ('plaintiff'). In consideration of the plaintiff's assistance, PSK (i) assigned the income and payments/proceeds that PSK was entitled to receive under the contract to the plaintiff ('said assigment'); and (ii) empowered the plaintiff and his nominees with authority, custody and management control of PSK. At all material times, the defendant was aware I

of the said assignment resulting in the 'take over' of PSK by the plaintiff and his nominees through the dealings between the parties as well as correspondences signed by the plaintiff for and on behalf of PSK in the course of constructing Phase I of the Melaka project. Phase I was successfully completed and a certificate of practical completion ('CPC') certifying the due completion was issued. Around the time of the CPC, the previous directors and shareholders of PSK wrested control of PSK from the plaintiff which led to the filing of the High Court originating summons ('KLHC OS') against PSK, its directors and shareholders and the defendant. The KLHC OS against the defendant was, however, withdrawn. The defendant's financier for the Melaka project was Malaysia Building Society Berhad ('MBSB'). After the issuance of CPC, direct payment was made to MBSB to the tune of RM20,000,000 and thus leaving a balance of RM8,963,235 ('balance contract sum') which was due and owing by the defendant to PSK under the contract. Meanwhile, the certificate of fitness for occupation ('CFO') was issued by the authorities. No payment was made by the defendant to PSK. The plaintiff, who claimed to be entitled to the balance contract sum was also not paid. PSK was later wound up. The plaintiff claimed in Suit 55 for, *inter alia*, the balance contract sum of RM8,963,235. However, during trial, the plaintiff varied his claim to a lesser sum of RM3,200,534.63. The High Court, in allowing the plaintiff's claim, held that the clauses in the Bailout and Temporary Takeover Agreement in reference to certain clauses were absolute in nature and concluded that the document in question had created an absolute assignment of PSK's right and liabilities in Phase I to the Melaka project. Hence, the plaintiff was capable of commencing the legal suit against the defendant in his own capacity as assignee as conferred upon him under the said assignment without having to join PSK as a party. Dissatisfied, the defendant appealed to this court. The defendant submitted that, at all material times, the plaintiff was a stranger to the PSK-Residenmas agreement, thus, the plaintiff could not enforce the contract and did not have *locus standi* and/or any cause of action against the defendant. The core issue that was to be considered and determined was whether there was any error or misdirection by the High Court Judge when he concluded that the Bailout and Temporary Take Over Agreement was an absolute assignment entitling the plaintiff to mount this suit.

Held (allowing appeal)
Per Mariana Yahya JCA delivering the judgment of the court:

(1) To determine if the assignment is conditional or absolute, the fact of an absolute assignment should normally be only that it is one by which the entire interest of the assignment in the chose in action such as the interest claimed by the assignee is, for the time being, transferred unconditionally to the assignee and placed completely under the assignee's control. (para 36)

(2) As to whether the Bailout and Temporary Take Over Agreement was an absolute assignment, one had to distinguish between the word 'temporary take over' and 'assign and/or assignment.' The Bailout and Temporary Take Over Agreement together with correspondences between the defendant, PSK and the plaintiff did not suggest any kind of assignment and/or absolute assignment of rights and interest of PSK to the group except as guarantor to PSK's bank loan and to safeguard the guarantor's interest *vis-à-vis* the plaintiff's agreement with PSK. Reading the four corners of the Bailout and Temporary Take Over Agreement, neither was the term 'assignment' stated nor was there any reference made to the term to the same effect. There was nothing to indicate that the agreement entered between PSK and the plaintiff was one of an assignment and/or absolute assignment to confer upon the plaintiff, all rights and/or interest on the income, payment/proceeds which accrued to the plaintiff in respect of the PSK-Residenmas agreement. (paras 40 & 41)

(3) Clause A of the Bailout and Temporary Take Over Agreement clearly states that the parties are the investors (group) and PSK. The investors have agreed to help out the financial crisis of PSK by infusing capital and investment in the said project. In consideration of the bailout of the crisis by the group, the parties agreed that the profit sharing in PSK was 50-50 between PSK and the group. Based on the said 50-50 profit sharing, the guarantors were entitled to the sum of RM2 million out of the unexpected profit of RM4 million. In the event the unexpected profit was less than RM4 million, then the guarantors are only entitled to RM3 million only. Based on that reason, the plaintiff had reduced his claim to RM3,200,534.63 only which was provided under cls. 3 and 4 of the Bailout and Temporary Take Over Agreement. The agreement was merely a profit-sharing scheme wherein it set out the framework for the allocation of profit as stated in the agreement. Such profit-sharing agreement/agreement could not be construed as an 'assignment.' The plaintiff was only the guarantor to PSK's loan and remained as guarantor. (paras 42 & 43)

(4) The clauses in the Bailout and Temporary Take Over agreements did not indicate an assignment of rights, but rather served as a protective measure for the investors. The repayment requirement which was spelt out in both clauses rendered the purported assignment conditional in nature. If the intent were to effectuate an absolute assignment, the PSK's rights and interests in relation to the proceeds/payment and income from the PSK-Residenmas agreement would have been unconditionally assigned to the plaintiff, rather than being divided between the group of investors and PSK. In such circumstances, it was not an absolute assignment in nature at all. (para 50)

(5) As far as the Bailout and Temporary Take Over agreement was concerned, parties to the contract were the Group of Investors and PSK. Furthermore, the Bailout and Temporary Take Over Agreement did not provide for assignment of rights and interests, including the PSK's entitlement to the income and proceed/payment in PSK – Residenmas agreement to the group of investors or the plaintiff. Be that as it may, there was nothing in the agreement which mentioned that the defendant was obligated to fulfil any of the terms and conditions specified by the plaintiff to PSK. It was clear that the Bailout and Temporary Take Over Agreement was not an absolute assignment as it fell short of meeting the requisite requirements stipulated under s. 4(3) of the Civil Law Act 1956. The plaintiff did not have the *locus standi* to bring the suit herein against the defendant by virtue of the purported absolute assignment. The plaintiff, being a stranger to PSK-Residenmas agreement, did not have cause of action to initiate this action against the defendant as the plaintiff was not privy to the said agreement. (paras 54-56)

Case(s) referred to:

Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd [1989] 2 CLJ 101; [1989] 1 CLJ (Rep) 41 SC ***(refd)***

Khaw Poh Chhuan v. Ng Gaik Peng & Yap Wan Chuan & Ors [1996] 2 CLJ 185 SC ***(refd)***

Mercantile Bank Of London Ltd v. Evans [1999] 2 QB 613 ***(refd)***

Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd [1985] 1 CLJ 56; [1985] CLJ (Rep) 231 FC ***(refd)***

Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor [2002] 2 CLJ 621 FC ***(refd)***

Sia Siew Hong & Ors v. Lim Gim Chian & Anor [1996] 3 CLJ 26 CA ***(refd)***

Suwiri Sdn Bhd v. Government Of The State Of Sabah [2008] 1 CLJ 123 FC ***(refd)***

UMW Industries (UMW) Sdn Bhd v. Ah Fook [1996] 1 CLJ 379 FC ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 4(3)

For the appellant/defendant - Amardas Jethanand & Yok Jiang Lin, M/s KP Ng & Amardas

For the respondent/plaintiff - Angeline Chin Yoke Fong, M/s Amin Karlos

[Editor's note: For the High Court judgment, please see YM Raja Halinuddin Raja Halid v. Residenmas Development Sdn Bhd [2017] CLJU 555; [2017] 1 LNS 555 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Mariana Yahya JCA:

Introduction

[1] This is an appeal by the appellant against the decision of the High Court dated 3 October 2022 in allowing the respondent's claim per Melaka High Court Civil Suit No: 22NCVC-55-10-2016 ("suit 55") as follows:

(i) the appellant to pay the respondent a sum of RM3,200,534.63;

(ii) the appellant to pay the respondent interest of 5% per annum on the judgment sum of RM3,200,534.63 from 31 October 2010 until full and final realisation; and

(iii) costs of RM30,000 subject to allocatur.

For ease of reference, the parties in this appeal shall be referred to as they were in the High Court, the respondent as "the plaintiff" and the appellant as "the defendant".

Background Facts

The facts of the case as narrated in the learned High Court Judge's grounds of judgment are as follows:

[2] The defendant is the developer of a project known as "Pembangunan Bercampur di atas Lot PT805-PT806, Muara Sungai Duyung, Mukim Alai, Daerah Melaka Tengah 1 Melaka" ("Melaka project").

[3] The defendant appointed Pembinaan Suci Kesturi Sdn Bhd ("PSK") as the main contractor for the development of the first phase of the Melaka Project ("Phase I") *via* a "letter of acceptance" dated 29 December 2006 which was duly accepted by PSK on 10 January 2007.

[4] In the course of executing its obligations under Phase I, PSK encountered financial and technical difficulties due to some disputes with its joint venture partner, Intraline Resources Sdn Bhd. In order to overcome these difficulties, PSK decided to obtain assistance from the plaintiff, YM Raja Halinuddin bin Raja Halid ("YM").

[5] In consideration of YM's assistance, PSK:

(i) assigned the income and payments/proceeds that PSK was entitled to receive under the contract to YM which is evidenced by, *inter alia*, YM's solicitors' Messrs Wan M Amin & Associates letter dated 16 April 2009 ("the said assignment"); and

(ii) empowered YM and his nominees with authority, custody and management control of PSK.

[6] At all material times, the defendant was aware of the said assignment resulting in the "take over" of PSK by the plaintiff and his nominees through the dealings between the parties as well as correspondence signed by the plaintiff for and on behalf of PSK in the course of constructing Phase I of the Melaka project.

[7] Phase I was successfully completed and a Certificate of Practical Completion dated 30 October 2010 ("CPC") certifying the due completion of Phase I to the value of RM28,963 235 was issued by Arkitek Pembangunan, the appointed architect for the Melaka project.

[8] Around the time of the CPC, the previous directors and shareholders of PSK wrested control of PSK from the plaintiff which led to the filing of Kuala Lumpur High Court Originating Summons No: 24NCvC-856-04-2012 ("KLHC OS") against PSK, its directors and shareholders and the defendant.

[9] In the KLHC OS, both the plaintiff and the defendant had exchanged affidavits, after which a consent order dated 16 August 2012 was recorded and the KLHC OS against the defendant was withdrawn.

[10] The defendant's financier for the Melaka project is Malaysia Building Society Berhad ("MBSB"). After the issuance of the CPC, a direct payment was made to MBSB to the tune of RM20,000,000 and thus leaving a balance of RM8,963,235 ("balance contract sum") which was due and owing by the defendant to PSK under the contract. Meanwhile, the certificate of fitness for occupation dated 19 September 2011 ("CFO") was issued by the authorities.

[11] No payment was made by the defendant to PSK. The plaintiff who claimed to be entitled to the balance contract sum was also not paid. PSK was wound up on 14 May 2013.

[12] The plaintiff claims in Suit 55 was for the following reliefs:

(i) the balance contract sum of RM8,963,235;

(ii) alternatively, such sum as the court deems fit;

(iii) general damages to be assessed;

(iv) interest;

(v) costs; and

(vi) any other reliefs that the court deems suitable.

[13] However during trial, the plaintiff through his witness statement varied his claim to a lesser sum of RM3,200,534.63.

Decision Of The High Court

[14] On 3 October 2022, the learned High Court Judge allowed the plaintiff's claim as follows:

> ADALAH PADA HARI DIHAKIMKAN bahawa Defendan hendaklah membayar kepada Plaintif:
>
> (a) Wang berjumlah RM3,300,534.63;
>
> (b) Faedah pada kadar 5% setahun ke atas RM3,300,534.63 tersebut dikira daripada 31.10.2010 sehingga tarikh penyelesaian penuh; dan
>
> (c) Kos berjumlah RM30,000 tertakluk kepada fi alokatur.

Findings Of The High Court

[15] In allowing the plaintiff's claim, the learned High Court Judge arrived at the findings as summarised below:

(i) the learned High Court Judge was of the view that the clauses in the Bailout and Temporary Take Over Agreement dated 16 April 2009 in reference to cls. 3, 7, 8, 9, 10, 19 and 20 are absolute in nature and had concluded that the document in question (*ie*, letter dated 16 April 2009) had created an absolute assignment of PSK's right and liabilities in Phase I of the Melaka project;

(ii) further, the learned High Court Judge also made a finding that although the word assignment had not been stated, that *ipso facto* does not negate the creation of an absolute assignment. The learned High Court Judge concluded that the existence of an absolute assignment as per the letter dated 16 April 2009, cannot be denied;

(iii) the defendant was given several written notices of the purported absolute assignment especially the so-called letter dated 11 May 2009 by the directors of PSK which had informed the defendant about the assignment of PSK rights, interests and/or benefit in respect of the PSK – Residenmas agreement ("the said agreement"); and

(iv) based on the above said reasons, the learned High Court Judge concluded that the Bailout and Temporary Take Over Agreement dated 16 April 2009 is a legally binding assignment as it has fulfilled all the requirements of s. 4(3) Civil Law Act 1956. Hence, the plaintiff is capable of commencing the legal suit against the defendant in his own capacity as assignee as conferred upon him under the said assignment without having to join PSK as a party.

[16] Dissatisfied with the High Court's decision, the defendant appealed to this court.

Defendant's Submission

[17] The PSK-Residenmas Agreement involves only PSK and the appellant. At all material times, the plaintiff was not a party, nor was he privy to the said agreement. As such, being a stranger to PSK-Residenmas agreement, the plaintiff cannot enforce the contract and does not have *locus standi* and/or any cause of action against the defendant.

[18] In order for the plaintiff to bring this instant suit alone as assignee, the plaintiff must first establish that there is an absolute assignment given by PSK to him by virtue of s. 4(3) of the Civil Law Act 1956, passing him the entire PSK's rights or interest over the income, payment/proceeds in relation to PSK-Residenmas agreement.

[19] It is the defendant's submission that the Bailout and Temporary Take Over Agreement is not an assignment, much less an absolute assignment. In the Bailout and Temporary Take Over Agreement dated 16 April 2009, the term "assignment" is nowhere stated. The said agreement also made no reference to any term which could have the same effect.

[20] The defendant further submitted that the Bailout and Temporary Take Over Agreement, particularly cls. 3 and 5, reveal that the agreement is merely a profit-sharing scheme which sets out a framework for the allocation of profit obtained by PSK from the Melaka project between the group of investors and PSK in consideration of the investors infusing capital and investment to PSK.

[21] The counsel emphasised that the transfer and re-transfer of PSK's shares as stipulated under cls. 7, 19 and 20 of the Bailout and Temporary Take Over Agreement are no more than a form of security given to the group of investors to safeguard their interests as investors in consideration of their capital infusion and investment. The clauses do not indicate an assignment of rights but rather serve as a protective measure for the investors.

[22] It is the defendant's further submission that there are no contemporaneous documents indicating the purported assignment, nor is there any express notice thereof. The Bailout and Temporary Take Over Agreement is not an absolute assignment as it falls short of meeting the requisite requirements stipulated under s. 4(3) of the Civil Law Act 1956. In short, the plaintiff has no *locus standi* to file Suit 55 herein against the defendant by virtue of the purported absolute assignment.

Plaintiff's Submission

[23] As regards the absence of the word "assignment" in any part of Messrs Wan M Amin & Associates' letter dated 16 April 2009, the plaintiff contended that the courts in construing contracts have never been bound by any specific label that may be used by the parties in any contract whether drafted by the parties themselves or by any legally qualified person.

[24] Applying the principle in *Sia Siew Hong & Ors v. Lim Gim Chian & Anor* [1996] 3 CLJ 26, the plaintiff submitted that in the construction of contracts, the court is not bound by the labels that parties choose to affix onto the particular document. The duty of the court is clear, that is to construe the document as a whole and to determine from its language and any other admissible evidence its true nature and purport.

[25] The plaintiff further submitted that the intention of the parties in executing the assignment was to solve PSK's financial woes *via* YM's Group provision of financial support by standing as guarantors and infusion of capital as well as other forms of investments. In return, PSK surrendered its' chose in action of RM1.6 million, first RM2 million of the estimated profits and further sum of RM1.6 million plus executed Form 32A to transfer all PSK shares to YM's Group or YM's Group's nominee(s).

[26] Yet further, an executive committee comprising only YM's Group effectively taking over PSK and surrendered to YM's Group was set up who effectively took over PSK including the management of the Melaka project.

A And YM's Group was to solely regulate PSK's cash flow and bank accounts. As the estimated profit is RM4 million, there was no real sharing of the expected income or profits from the Melaka project. Express provision for 50:50 division of profits in cl. 3(b) of Part "C" of the assignment would only make sense if read in tandem with cl. 4 of Part "C", namely 50:50 division
B would apply where profits exceeded RM4 million (which was not expected). The plaintiff contends that the High Court Judge was right to conclude that the transaction between PSK and YM was an absolute assignment on evaluation of the documentary evidence.

[27] As regards the assignment by way of security, the plaintiff argued that
C if it is true that the said assignment was merely to secure the cash pumped into or loaned to PSK, then there would be no need to set up an executive committee, take over management of the Melaka project, transfer the shareholding of PSK away from the original shareholders of PSK and stand as guarantor(s) in favour of PSK.

D **[28]** Going to the issue of notice, it is impossible to ignore the probability that in the course of YM's management of the Melaka project from the assignment (dated 16 April 2009) by the second quarter of 2009, that the defendant already knew of the takeover and the assignment. In particular, PSK's letter dated 11 May 2009 signed by the previous directors of PSK was
E already made known to the defendant when the affidavit in the KLHC OS was received.

[29] The plaintiff further submitted that the Bailout and Temporary Take Over Agreement dated 16 April 2009 is an assignment/absolute assignment and the defendant is bound by the said assignment. The plaintiff also
F submitted that on balance of probability, he has proven his claims against the defendant.

Our Decision

[30] The core issue that is to be considered and determined by this court
G is whether there was any error or misdirection by the learned High Court Judge when he concluded that the Bailout and Temporary Take Over Agreement dated 16 April 2009 was an absolute assignment entitling the plaintiff to mount this suit. If the plaintiff fails to establish an absolute assignment, then the issue of quantum becomes academic.

H **[31]** It is pivotal to note that the basis for the learned High Court Judge in deciding that Bailout and Temporary Take Over Agreement dated 16 April 2009 is an assignment and/or absolute assignment are cls. 3, 7, 8, 9, 10, 19 and 20 of the said assignment ("the said clauses") and s. 4(3) of the Civil Law Act 1956. The learned judge also referred to several letters from PSK to the
I defendant which the plaintiff had relied upon in support of their claim.

[32] The salient and relevant terms of the Bailout and Temporary Take Over Agreement are as follows:

(i) Clause A sets out the parties to the Bailout and Temporary Take Over Agreement:

A. Parties

(i) The Investors comprising a total of eight (8) individual Investors ("the Group"), three (3) of whom shall stand as guarantors for a loan by PSK ("the Guarantors") shall all be represented by Y.M. Raja Halinuddin bin Raja Halid ("RH"). An authorisation letter shall be issued by the Group to RH and shall be kept by Messrs Wan M Amin & Associates in escrow unless specifically requested in writing by the PSK.

(ii) Pembinaan Suci Kesturi Sdn Bhd ("PSK")

(ii) Part C – cls. 3, 4, and 5 of Part C sets out the distribution arrangement of the profit between the group of investors and the PSK;

Clause 3

3. In consideration of the bailout as detailed in Part C Item (i) above, the Group shall be entitled to the following:

a) Repayment of the RM1.6 million capital infusion which shall be taken as part of total costs for the Melaka Project; and

b) The Estimated Profits ("the Profits") from the Project is expected to be RM4 million shall be divided equally between PSK and the Group (on a 50:50 ratio basis). The Group shall be entitled to the first RM2 million of the Profits from the payment made by MBSB which shall be distributed as follows:

i) RM1.6 million to the Group divided in proportion with their individual investments,

ii) The balance of RM400,000 shall be distributed equally amongst the Guarantors.

c) Thereafter a further RM1.6 million shall be paid to the Group from the Profits derived from Melaka Project.

d) In the event that the final Profits is less than the estimated RM4 million, the Group shall be entitled to the first RM2 million of the Profits and PSK shall only be entitled to any sum above the initial RM2 million.

Clause 4

Therefore, the total repayment (capital investment + returns + Guarantors' fees) is RM3.2 million + RM400,000/-)

iii) Additional Profits from the Melaka Project in excess of the RM4 million.

A Clause 5

5. After the income from the Melaka Project has been applied in accordance with Part C item (ii) above, and in the event PSK is able to achieve Profits in excess RM4 million the excess in Profits (whatever the sum) shall be applied as follows:

B a) The Guarantors: 50 %

b) PSK: 50%

Profit sharing ratio: 50:50

(iii) Clauses 7, 19, and 20 provide for the transfer of shares by PSK's C shareholders to the group of investors and the re-transfer of PSK's share to the original shareholders

Clause 7

7. In consideration of the Bailout and Investments by the Group as stated in Part C Item (i) above and in addition to items (ii) and D (iii) above PSK's shareholders shall execute Form 32A to transfer their shares to the Group or whomsoever the Group should assign to hold the shares on their behalf.

Clause 19

E 19. Once the Group have obtained full payment of all its advances and returns from the Melaka Project and when the Group is, in its absolute discretion, satisfied that their interests in the Melaka Project has been fully protected they will cause the re-transfer of PSK's shares back to the original shareholders/transferors once.

F **Clause 20**

20. The Group, through their representative(s), shall have complete operational control of PSK until the re-transfer of shares have been affected and their representative(s) in PSK have vacated their respective positions therein.

G **The Claim In Absolute Assignment**

[33] It is trite that in order to determine whether there is an absolute assignment, the court must confine itself to the four corners of the instrument. In *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* [1985] 1 CLJ 56; [1985] CLJ (Rep) 231, Seah FJ held as follows:

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> It is plain that in every case of this kind, all the terms of the instrument must be considered; and whatever may be the phraseology adopted in some particular part of it, if, on consideration of the whole instrument, it is clear that the intention was to give a charge only, then the action must be in the name of the assignor. While, on the other hand, if it is I clear from the instrument as a whole that the intention was to pass all the rights of the assignor in the debt or chose in action to the assignee,

> then the case will come within section 25 and the action must be brought in the name of the assignee (Mathew LJ *Hughes v. Pump House Hotel Co. Ltd.* [1902] 2 KB 190). Having stated the preliminary and before we examine the terms of the document of assignment dated February 18, 1978 we would dispose of a short submission of learned counsel for the appellant. It was contended that since the assignment was entered into following the execution of a loan agreement between the appellant and the Public Bank, the said assignment should not be read in isolation but should be read in conjunction with the said loan agreement. With respect, we do not agree. In our judgment and it seems clear from the authorities above-mentioned, *whether or not an assignment is an absolute one (not purporting to be by way of charge only) within the meaning of section 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself.*
>
> (emphasis added)

Ultimately, whether or not an assignment is absolute for the purposes of the statutory regime is an issue of construction (See *Mercantile Bank of London Ltd v. Evans* [1999] 2 QB 613).

[34] The decision in *Nouvau Mont Dor (M) Sdn Bhd* (*supra*) was followed by the decision of the Federal Court in *Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor* [2002] 2 CLJ 621 where one of the issues raised therein was whether the loan agreement *cum* assignment was an equitable mortgage or an equitable charge. The loan agreement *cum* assignment was entered into on 3 January 1996 under which the respondents' rights, title, and interest under the sale and purchase agreement were absolutely assigned to the appellant. It was held that since the assignment under the 'loan agreement cum assignment' was absolute and not one 'purporting to be by way of charge only' within the meaning of s. 4(3) of the Civil Law Act 1956, the borrowers, as assignors, were not even competent to maintain the originating summon.

[35] Similarly, in *Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd* [1989] 2 CLJ 101; [1989] 1 CLJ (Rep) 41, the Supreme Court held that the deed clearly purports and is intended in point of form to be an absolute assignment because of the use of the words 'absolutely'. The use of the words "absolutely assigns" demonstrates that the instrument was intended by the parties to be an absolute assignment and not by way of charge only. The intention of the parties clearly was that the deed should be absolute in the sense that the assignee should have all the rights, title, and interest of the assignor in the sale and purchase agreement.

[36] To determine if the assignment is conditional or absolute, the fact of an absolute assignment should normally be only that it is one by which the entire interest of the assignment in the chose in action such as the interest claimed by the assignee is, for the time being, transferred unconditionally,

to the assignee and placed completely under the assignee's control (See *Khaw Poh Chhuan v. Ng Gaik Peng & Yap Wan Chuan & Ors* [1996] 2 CLJ 185; [1996] 1 MLJ 761, SC).

[37] Further, s. 4(3) of the Civil Law Act 1956 also provide conditions for effecting absolute legal assignments. Section 4(3) CLA read as follows:

> Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the rights of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

[38] The Federal Court in *UMW Industries (1985) Sdn Bhd v. Ah Fook* [1996] 1 CLJ 379, FC set out the three conditions for effecting an absolute assignment and they are as follows:

(i) that the assignment must be in writing under the hand of the assignor;

(ii) that the assignment must be absolute and not by way of charge only; and

(iii) that express notice in writing must have been given to the person liable to the assignor under the assigned chose in action.

[39] If the assignment fulfills all the above three conditions, it would transfer absolutely the chose in action and the right to sue upon it in the assignee's own name. As to the assignment in writing, no particular form is necessary but it must be absolute *ie*, one that purports to pass the entire interest of the assignor in the chose in action.

[40] Guided by the above authorities, the question before us is whether the Bailout and Temporary Take Over Agreement dated 16 April 2009 is an absolute assignment?

Based on evidence and circumstances of the case, in our considered view, one has to distinguish between the word 'temporary take over' and 'assign and/or assignment'. The Bailout and Temporary Take Over Agreement together with correspondence between the defendant, PSK and the plaintiff do not suggest any kind of assignment and/or absolute assignment of rights and interest of PSK to the group except as guarantor to PSK's bank loan and to safeguard of the guarantor's interest *vis-à-vis* the plaintiff's agreement with PSK.

[41] Reading the four corners of the Bailout and Temporary Take Over Agreement, we note that neither is the term "assignment" stated nor is there any reference made to the term to the same effect. There is nothing to indicate that the agreement entered between PSK and the plaintiff was one of an assignment and/or absolute assignment to confer upon the plaintiff, all rights and/or interest on the income, payment/proceeds which accrued to the plaintiff in respect of the PSK-Residenmas agreement.

[42] Coming back to Bailout and Temporary Take Over Agreement, in our view cl. A of the said agreement clearly states that the parties are the investors (group) and PSK. The investors have agreed to help out the financial crisis of PSK by infusing capital and investment in the said project. In consideration of the bail out of the crisis by the group, the parties have agreed that the profit sharing in PSK is 50-50 between PSK and the group. Based on the said 50-50 profit sharing, the guarantors are entitled the sum of RM2 million out of the expected profit of RM4 million. In the event the expected profit is less than RM4 million, then the guarantors are only entitled to RM3 million only. Based on that reason, the plaintiff has reduced his claim to RM3,200,534.63 only which is provided under cls. 3 and 4 of the Bailout and Temporary Take Over Agreement. It is our considered view that the agreement is merely a profitsharing scheme wherein it sets out the framework for the allocation of profit as stated in the agreement. Such profit-sharing arrangement/agreement cannot be construed as an "assignment".

[43] We have looked at all the correspondence between plaintiff and the defendant. We find that the plaintiff had never mentioned that he was the assignee in reference to the so-called existing assignment. In fact, it is our respectful view that the plaintiff was only the guarantor to PSK's loan and remained as guarantor.

[44] In support of the plaintiff's status as guarantor to PSK, several letters dated 28 August 2009, 15 October 2010, and 22 November 2020 clearly demonstrate that the plaintiff signed these letters for and on behalf of PSK as guarantor cum Executive Committee of PSK. We observed that none of those letters refer to the plaintiff as assignee. We agree with learned counsel for the defendant's submission that if there was indeed an assignment by PSK to the plaintiff, such assignment would have logically been referenced in the letters and the plaintiff would have signed them in the capacity of an assignee rather than as a guarantor (Executive Committee PSK).

[45] The plaintiff alleged that PSK's letter dated 11 May 2009 is sufficient enough to show that notice regarding the purported assignment from PSK to the plaintiff had been given to the defendant which the defendant had knowledge of the same. We refer to paras. 1 and 2 therein which read as follows:

To whom it may concern,

We hereby inform with effect from the date of this letter, Sungai Duyong Project (Phase 1) in Melaka will be under the responsibility of our new stakeholder, SS Industries Sdn Bhd. ("SSI"). The project site in Sungai Duyong, Melaka would however continue to managed by our Project Manager, Mr. Tee Min Hoe (IC No: 710112-01-5001) and reported to SSI representative namely:

1) Raja Halinuddin B. Raja Halid
2) Wan Amal Binti Wan Mokhtar
3) Wan Mohammad Nasri Bin Wan Mokhtar
4) Zahrin Bin Mahat

[46] From the plain reading of the above said paragraphs, we agree with the defendant's counsel submission that the above paragraphs merely state that SSI would assume the role of the new stakeholder of Melaka project (Phase 1). In so far, the project management is concerned, it is pertinent to note that it would still continue under the supervision of PSK's project manager, Mr Tee Min Hoe, who should provide updates to SSI's representatives, including the plaintiff on the project.

[47] It is apparent that there is nothing therein to suggest that PSK had assigned all its rights, interests and/or or benefit in respect of the PSK-Residenmas agreement. In short, there are no documents nor express notices of assignment in writing to the defendant. The content of the letter dated 11 May 2009 do not reflect the finding of the learned High Court Judge that there were notices of assignment in writing to the defendant.

[48] Clause 18 of the Bailout and Temporary Take Over Agreement also do not suggest that PSK's account is under full control of the plaintiff. In fact, the signatory to the PSK's account is still the PSK's representative. Clause 18 of the said agreement provides for the signatory to the PSK's account;

18. The Group representative(s) shall be a named signatory to PSK's Account and shall be one of the two (2) signatories of PSK's cheques. The other signatory shall remain a representative of PSK.

[49] As regards to cls. 19 and 20 of the Bailout and Temporary Take Over Agreement, we agree with the learned counsel for the defendant's submission that both clauses refer to PSK's shares and that PSK's operational control shall be transferred to the group of investors until and unless the full repayment of the advances and returns from the Melaka project. Such transfer and re-transfer of share are no more than a form of security given to the group of investors to safeguard their interests as investors in consideration of their capital infusion and investment.

[50] The clauses do not indicate an assignment of rights, but rather serve as a protective measure for the investors. In our view, the repayment requirement which was spelt out in both clauses renders the purported assignment conditional in nature. If the intent were to effectuate an absolute assignment, the PSK's rights and interests in relation to the proceeds/payment and income from the PSK-Residenmas agreement would have been unconditionally assigned to the group of investors/plaintiff, rather than being divided between the group of investors and PSK in the manner set out in cls. 3 and 5 of the Bailout and Temporary Take Over Agreement. In such circumstances, it is our respectful view that, it is not an absolute assignment in nature at all as decided by the learned High Court Judge.

[51] In the light of the foregoing cls. 3, 4, 5, 7, 19, and 20 of the Bailout and Temporary Take Over Agreement, it would be a strange interpretation to state that the alleged assignment created was an absolute assignment when the agreement between the group investors to PSK was purely for the purpose of security of the capital or investment injected by the group of investors and not otherwise.

Privity Of Contract

[52] The doctrine of privity of contract is that as a general rule, a contract cannot confer rights or impose obligations on strangers to it, *ie*, persons who are not parties to it (See *Suwiri Sdn Bhd v. Government Of The State Of Sabah* [2008] 1 CLJ 123; [2008] 1 MLJ 743). Further, it is trite law that a non-party to a contract cannot enforce the contract. Only parties to contracts can sue to enforce their rights or claim damages as such.

[53] The defendant in its letter of acceptance dated 29 December 2006 accepted the tender sum submitted by PSK for the sum of RM28,962,384. The defendant shall provide the financial guarantee from MBSB for the contract sum agreed by both parties. The amount, terms and conditions of drawdown shall be based on the terms specified in the financial agreement. The evidence does not show that the defendant was a party to the Bailout and Temporary Take Over Agreement.

[54] As far as Bailout and Temporary Take Over Agreement dated 16 April 2009 is concerned, it is our respectful view that parties to the contract are the group of investors and PSK. Furthermore, the Bailout and Temporary Take Over Agreement does not provide for assignment of rights and interests, including the PSK's entitlement to the income and proceed/payment in PSK-Residenmas agreement to the group of investors or the plaintiff. Be that as it may, there is nothing in the agreement which mentions that the defendant is obligated to fulfil any of the terms and conditions specified by the plaintiff to PSK.

[55] It is clear that the Bailout and Temporary Take Over Agreement is not an absolute assignment as it falls short of meeting the requisite requirements stipulated under s. 4(3) of the Civil Law Act 1956. In our view, the learned High Court Judge has erred in fact and in law in deciding that the plaintiff has the *locus standi* to bring the suit herein against the defendant by virtue of the purported absolute assignment.

[56] It is therefore clear that the plaintiff, being a stranger to PSK-Residenmas agreement, does not have the *locus standi* and cause of action to initiate this action against the defendant as the plaintiff is not privy to the said agreement.

Conclusion

[57] Upon perusal of all evidence before the trial judge and upon reading the learned High Court Judge's grounds of judgment, we are of the considered view that the learned High Court Judge has erred in his interpretation of the clauses within the four corners of the Bailout and Temporary Take Over Agreement. The learned High Court Judge also has misdirected himself in fact and law in failing to appreciate that the Bailout and Temporary Take Over Agreement dated 16 April 2009 is a profitsharing scheme rather than an assignment and/or absolute assignment.

[58] We are not persuaded by the learned counsel for the respondent's submission that the Bailout and Temporary Take Over Agreement dated 16 April 2009 is an assignment and/or absolute assignment.

[59] Based on the abovesaid reasons, we are impelled to the conclusion that the Bailout and Temporary Take Over Agreement dated 16 April 2009 is not an assignment and/or absolute assignment. Therefore, the plaintiff had no cause of action and lacked the requisite *locus standi* to commence this action. In view of our conclusion on liability, the issue of quantum is rendered academic.

[60] In conclusion, we unanimously find that there is clearly an appealable error in the learned High Court Judge's decision that warranted appellate intervention. As such we made the following orders:

(i) the appeal is allowed;

(ii) the decision of the High Court dated 3 October 2022 is set aside;

(iii) the plaintiff's claim (per Suit 55) is dismissed; and

(iv) the plaintiff (respondent) is to pay to the defendant (appellant) the sum RM50,000 (subject to allocator) as costs here and the below.